Anne Lim Keng See (trading as Golden Kintex-Sole-proprietorship) v Malayan Banking Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–23–51 OF 2001
HARMINDAR SINGH JC
3 JULY 2009

Civil Procedure — Absence of plaintiff — Dismissal of action due to — Whether action should have been adjourned — Whether satisfactory reasons given for application for adjournment — Whether plaintiff failed to be present at hearing at own peril — Rules of the High Court 1980 O 35 r 2(1)

The plaintiff was a businesswoman who had various accounts with the defendant bank. Sometime in 2001, the defendant had frozen the accounts of the plaintiff on the basis that a bankruptcy notice had been issued against the plaintiff. As a result, various cheques issued by her were dishonoured by the defendant and also cheque issued in favour of the plaintiff was not credited into the plaintiff's account. The plaintiff sought damages for libel and the matter was fixed for trial for two days. The date for the trial was fixed almost three months prior to the trial and a date for case management was given. However, all the parties except for the plaintiff were present during the trials. As the plaintiff was the only witness, her counsel requested for an adjournment, which was refused. The plaintiff alternatively requested for the matter to be struck out instead of being dismissed. However, she failed and her claim was dismissed. Hence, the appeal.

Held, dismissing the case with costs:

(1) It is trite that the power to grant an adjournment of the hearing or trial of any matter is wholly at the discretion of the court. The plaintiff had a duty to check with her solicitors from time to time as to the status of her case. There was insufficient cause shown by the plaintiff to warrant the learned judge's discretion in granting the adjournment. It is imperative that once a case is set down for hearing, unless there are good and satisfactory reasons, there should be no adjournments. The reasons which were advanced by the plaintiff's solicitors and the plaintiff for the purpose of obtaining an adjournment was not satisfactory and the reasons for adjournment did not emanate from circumstances beyond the control of the parties (see paras 4, 7, 8 & 10).

(2) In accord with O 35 r 2(1) of the Rules of the High Court 1980, due to the plaintiff's failure to be present during the trial, despite being the only witness in her suit, the court was entitled to order a dismissal of the action as the case for the plaintiff remained unproven. If the parties do not attend and do not ensure that their witnesses are present, they do so at their own peril (see paras 19–20).

[Bahasa Malaysia summary

Plaintif merupakan seorang ahli perniagaan yang memiliki pelbagai akaun dengan bank defendan. Sekitar tahun 2001, defendan telah membekukan akaun plaintif atas dasar bahawa notis kebankrapan telah dikeluarkan terhadap plaintif. Akibatnya, pelbagai cek yang dikeluarkan olehnya tidak dilayan oleh defendan dan cek yang dikeluarkan kepada plaintif tidak dikreditkan dalam akaun plaintif. Plaintif menuntut ganti rugi untuk fitnah bertulis dan perkara tersebut ditetapkan untuk perbicaraan selama dua hari. Tarikh untuk perbicaraan tersebut ditetapkan hampir tiga bulan sebelum perbicaraan dan tarikh untuk pengurusan kes diberikan. Walau bagaimanapun, semua pihak kecuali plaintif hadir semasa perbicaraan. Memandangkan plaintif merupakan satu-satunya saksi, permintaan daripada peguam plaintif untuk penangguhan tidak diberikan. Plaintif secara alternatif memohon agar perkara tersebut dibatalkan daripada ditolak. Walau bagaimanapun dia gagal dan permohonannya ditolak. Maka, rayuan ini.

Diputuskan, menolak kes dengan kos:

(1) Adalah nyata bahawa kuasa untuk memberikan penangguhan perbicaraan atau perbicaraan apa-apa perkara bergantung sepenuhnya kepada budi bicara mahkamah. Plaintif mempunyai kewajipan untuk memeriksa status kesnya dari masa ke semasa dengan peguam caranya. Tidak terdapat alasan mencukupi yang ditunjukkan oleh plaintif untuk membolehkan budi bicara hakim yang bijaksana dalam membenarkan penangguhan. Adalah amat penting bahawa apabila sesebuah kes ditetapkan untuk perbicaraan, melainkan terdapat alasan yang baik dan memuaskan, penangguhan tidak sepatutnya diberikan. Alasan-alasan yang dikemukakan oleh peguam cara plaintif dan plaintif bagi tujuan mendapatkan penangguhan tidak memuaskan dan alasan-alasan untuk penangguhan tersebut tidak timbul daripada keadaan di luar kawalan pihak-pihak (lihat perenggan 4, 7, 8 & 10).

(2) Menurut A 35 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980, disebabkan oleh kegagalan plaintif untuk hadir semasa perbicaraan, meskipun dia satu-satunya saksi dalam guamannya, mahkamah berhak untuk mengarahkan penolakan tindakan tersebut memandangkan kes

untuk pihak plaintif kekal tidak dibuktikan. Sekiranya pihak tidak menghadiri dan tidak memastikan bahawa saksi-saksi mereka hadir, mereka perlu menanggung apa yang mereka lakukan (lihat perenggan 19–20).]

Notes

For cases on dismissal of action due to absence of plaintiff, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2–3.

Cases referred to

K Ratnasingam v Kow Ah Dek & Anor [1983] 2 MLJ 297; [1983] 1 CLJ 30, PC (refd)

Lee Ah Tee v Ong Tiow Pheng & Ors [1984] 1 MLJ 107; [1984] 1 CLJ 26, FC (refd)

Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd [1982] 2 MLJ 79; [1982] CLJ (Rep) 747, HC (refd)

Sheikh Abdul Aziz Sheikh Shukor v Ors v Sheikh Mustapha Sheikh Shukor v Ors [2004] 3 CLJ 108, CA (refd)

Tee Ha Leong v Messrs Low & Lim & Anor [2005] 4 MLJ 426, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 35 r 1(1), (2)

Lalitha Nagamuthu (Arun & Co) for the plaintiff.
Harmeet Singh (Raja Eleena Siew Ang & Associates) for the defendant.

Harmindar Singh JC:

[1] The plaintiff was a businesswoman. She had various accounts with the defendant bank. Sometime in 2001, the defendant had frozen the accounts of the plaintiff on the basis that a bankruptcy notice had been issued against her. As a result, three cheques issued by her were dishonored by the defendant. A further cheque issued in favour of the plaintiff was not credited into the plaintiff's account for the same reason. The plaintiff is now seeking damages for libel in this suit.

[2] This matter was fixed for trial for two days on the 25 and 27 May 2009. At the trial, learned counsel for the plaintiff was present but the plaintiff was absent. Learned counsel for the defendant was present with his witness. Not surprisingly, learned counsel for the plaintiff sought an adjournment. This was objected to by the defendant. After hearing arguments, the application for adjournment was refused. Learned counsel for the plaintiff had no witnesses. She then asked for the matter to be struck out instead of being dismissed. Again she was unsuccessful. The plaintiff's claim was then dismissed with costs.

[3] The plaintiff has now filed an appeal. From the notice of appeal, it is unclear as to what really was the plaintiff's complaint. It would have been helpful if the notice of appeal specified what exactly is being appealed so that the judge is not misled (see *Sheikh Abdul Aziz Sheikh Shukor v Ors v Sheikh Mustapha Sheikh Shukor v Ors* [2004] 3 CLJ 108). I will therefore deal with both issues.

WAS THE PLAINTIFF ENTITLED TO AN ADJOURNMENT?

[4] It is trite that the power to grant an adjournment of the hearing or trial of any matter is wholly at the discretion of the court. In exercising this discretion, the question to ask is whether there are adequate or sufficient reasons to refuse the adjournment (*Lee Ah Tee v Ong Tiow Pheng & Ors* [1984] 1 MLJ 107; [1984] 1 CLJ 26). Also, the burden is on the person making the application for an adjournment to provide sufficient or adequate material to persuade the court to exercise the discretion in his or her favour (*Sheikh Abdul Aziz Sheikh Shukor & Ors v Sheikh Mustapha Sheikh Shukor & Ors*).

[5] In the instant case, the grounds for the application for adjournment was that the plaintiff could not proceed with trial as the plaintiff herself could not be located. Learned counsel for the plaintiff informed the court that she had made all the efforts to locate the plaintiff at all the possible addresses and phone numbers that were available to her but to no avail. As the plaintiff was the only witness, learned counsel applied for an adjournment to locate the plaintiff. Learned counsel for the defendant objected to the adjournment as the defendant was ready and the matter had been pending for some time.

[6] As any discretion in such a case must be exercised judicially, it was therefore incumbent upon the court to consider all the facts and circumstances. It was noteworthy that the trial dates were fixed as early as on 5 March 2009, that is, almost three months prior to the trial. The record shows that on that particular day, the parties were instructed to file the bundle of pleadings, bundle of documents and the witness statements. A further case management date was then given for 11 May 2009 to ascertain if the directions were complied with. On 11 May 2009, both counsel were present again and the necessary documents were submitted. Considering this state of affairs, it was therefore more than a little odd that the plaintiff did not know or was not informed of the trial.

[7] Even if the plaintiff could not be informed, which I find hard to accept, it was still her duty to check with her solicitors from time to time as to the

status of her case. If she had moved to some other address, surely the responsible thing to do was to inform her solicitors so that she was contactable.

[8] Looking at these circumstances, could it be said that just cause has been shown to warrant an adjournment? Are there good or satisfactory reasons for granting an adjournment? To my mind, the answer to these questions was plain. I did not think that sufficient cause had been shown to exercise my discretion in favour of granting the adjournment.

[9] It cannot be overstated that judicial time is now at a premium. The present practice in the civil division of the Kuala Lumpur High Court is that only one case is fixed for trial at a time for the requisite number of days. The trial is expected to be completed within the given number of days. This is to avoid criticism of delayed or broken trials as was observed by the Privy Council in *K Ratnasingam v Kow Ah Dek & Anor* [1983] 2 MLJ 297; [1983] 1 CLJ 30 (Rep). This is already well-known to lawyers practising in Kuala Lumpur and even beyond. It was therefore incumbent upon the plaintiff to be fully prepared for the trial.

[10] It cannot be gainsaid that adjournments will add to the problem of backlog of cases. A case that is adjourned will have to be reallocated fresh trial dates which will affect other cases. The parties and the witnesses may become disillusioned after having taken time off and incurring expenses to be then told that the case is adjourned. As a consequence, public trust and confidence in the judicial system may be seriously impaired and undermined. For these reasons, it is imperative that once a case is set down for hearing, unless there are good and satisfactory reasons, there should be no adjournments. The reasons which are advanced for the purpose of seeking an adjournment must also emanate from circumstances beyond the control of the parties.

[11] In the instant case, I considered the reasons given for seeking an adjournment to be far from satisfactory. The matters raised were also not beyond the control of the plaintiff or her solicitors. I therefore came to the conclusion that an adjournment should not be granted.

SHOULD THE CASE HAVE BEEN DISMISSED OR STRUCK OUT?

[12] In this situation, O 35 r 1(1) and (2) of the Rules of the High Court 1980 ('RHC') are relevant. They read as follows:

(1) If, when the trial of an action is called on, neither party appears, the

action may be struck out of the list without prejudice, however, to the restoration thereof, on the discretion of a Judge.

(2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counter claim in the absence of that party.

[13] In the present case, I was prepared to deal with the merits of the case. So when the application for adjournment was refused, I had called on learned counsel for the plaintiff to proceed with her case. Since the plaintiff, who was the only witness to be called for the plaintiff's case, was absent, the action was dismissed.

[14] A not too dissimilar situation arose in the case of *Tee Ha Leong v Messrs Low & Lim & Anor* [2005] 4 MLJ 426. In that case, when the case came up for hearing, both counsel and the defendant were present. However, the plaintiff was absent. The plaintiff had earlier applied for an adjournment on the grounds that he had to accompany his son to the United Kingdom to enter a medical faculty in the University of London. This application was rejected by the court. A further oral application on the same ground was made on the trial day and again it was refused. The court ordered the plaintiff's counsel to present his case. As the plaintiff himself was the only witness, the plaintiff's case was dismissed with costs. The court took the view that when the plaintiff was called upon to present his case and he could not do so resulting in a dismissal of the case, the effect is the same as if it were a judgment dismissing the action on merits.

[15] Also noteworthy in that case was the distinction made between striking out and dismissing an action. James Foong J (as he then was) observed as follows at p 432:

> I am of the view that there is a distinction between striking out and dismissing a case. If the case is struck out then O 35 r 2(1) of the Rules of the High Court can be utilised to apply for reinstatement. But when the case is dismissed, as in the instance case, then the avenue open to the aggrieved party is to appeal. This is based on the rational that the case was already heard on merits.

[16] This probably explains why learned counsel for the plaintiff preferred to have an order striking out the action so that an application for reinstatement could be made later if the need arose.

[17] In the case of *Shaharuddin Abdul Rahman v Sitisah Ismail Sdn Bhd* [1982] 2 MLJ 79; [1982] CLJ (Rep) 747, a similar situation arose. When the case was called for hearing, the plaintiff's representative and their counsel

were present. The defendant was absent but his counsel was present. The magistrate then recorded judgment in favour of the plaintiffs. On appeal, Ajaib Singh J (as he then was) held as follows at p 748:

> In my view it was wrong for the learned magistrate to give judgment against the defendant by default. It is true that the defendant himself was absent when the case was called up for hearing but as his counsel was present the learned magistrate was not empowered to invoke r 6(1)(a) of O 28 and give judgment by default. If the learned magistrate was not inclined to exercise his discretion in favour of granting an adjournment he ought to have proceeded to hear and determine the action in the normal manner which meant that the plaintiffs had to prove their case by adducing sufficient evidence and their witnesses would have been subject to cross-examination by the defendant's counsel who would also have had the right to call witnesses for the defence and to make a submission to the court at the end of the hearing. Similarly if the plaintiff is absent but his counsel is present when an action is called on for hearing the court cannot just dismiss the action but must allow the plaintiff's counsel to present his case and call witnesses if he has any in support.

[18] Upon a perusal of the cases and O 35 r 1(1) and (2) of the RHC, the position can be stated thus. If neither party appears at the hearing, the action may be struck out. However, if one party appears and the court is ready to hear the matter on its merits, then the testimony of all the witnesses present must be heard before a decision is pronounced. In the case where neither the plaintiff nor his or her witnesses are present, then the appropriate order is a dismissal of the action.

[19] In the present case, as the plaintiff was the only witness and was absent, the court was entitled to order a dismissal of the action as the case for the plaintiff remained unproven. If the shoe was on the other foot, that is, if it was the defendant or his or her witnesses who were not present, then the plaintiff could proceed to call his or her witnesses to prove the case and counsel for the defendant could then cross-examine them.

[20] This demonstrates the importance of ensuring the presence of the parties and their witnesses when the action is called on for hearing or trial. If the parties do not attend and do not ensure that their witnesses are present, they do so at their own peril.

[21] For these reasons, I considered that it was more appropriate to order the plaintiff's case to be dismissed with costs.

Case dismissed with costs.

Reported by Mashrifah Ravendran